No. 92-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

RICHARD G. TARANTO
Counsel of Record
KLEIN, FARR, SMITH & TARANTO
2550 M Street, NW
Washington, D.C. 20037
(202) 775-0184

JOHN H. KAZANJIAN
IRENE C. WARSHAUER
MARY BETH GORRIE
ANDERSON KILL OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700
Counsel for Petitioner

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
BARBARA C. BIDDLE
ROBERT M. LOEB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondent

(For Further Appearances See Reverse Side of Cover)

PETITION FOR CERTIORARI FILED JULY 22, 1992
CERTIORARI GRANTED OCTOBER 19, 1992

STUART E. RICKERSON
Vice President-
General Counsel
JOHN G. O'BRIEN
Associate General Counsel
Keene Corporation
200 Park Avenue
New York, New York 10166
(212) 557-1900
Of Counsel

TABLE OF CONTENTS

	Page
A. Chronological List of Relevant Docket Entries	JA-1
B. The Appendix to the Petition for Certiorari includes the following items:	
UNR Industries, Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992) ("*in banc*" decision)	Pet. App. A
UNR Industries, Inc. v. United States, 926 F.2d 1109 (Fed. Cir. 1991) (Order for further briefing and argument)	Pet. App. B
UNR Industries, Inc. v. United States, 926 F.2d 1109 (Fed. Cir. 1990) (Order vacating panel decision and granting rehearing *in banc*)	Pet. App. C
UNR Industries, Inc. v. United States, 911 F.2d 654 (Fed. Cir. 1990) ("panel decision")	Pet. App. D
Keene Corp. v. United States, 17 Cl. Ct. 146 (1989) (Order granting motion for partial reconsideration)	Pet. App. E
Keene Corp. v. United States, No. 585-81C (Ct. Cl. 1981) ("*Keene II*")	Pet. App. F
Miller v. Johns-Manville Products Corp., No. 78-1283 (W.D. Pa. 1979) (Keene's motion for voluntary dismissal of third-party claim against the Government)	Pet. App. G
Keene Corp. v. United States, No. 579-79C (Ct. Cl. 1979) ("*Keene I*")	Pet. App. H

Page

Miller v. Johns-Manville Products Corp., No. 78-1283E (W.D. Pa. 1979) (Keene's amended third-party complaint impleading the Government) Pet. App. I

Miller v. Johns-Manville Products Corp., No. 78-1283E (W.D. Pa. 1979) (original complaint) ..... Pet. App. J

C. Order, *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. May 1, 1981) (denying defendant's motion for summary judgment) ... JA-4

D. Amended Complaint, *Keene Corp. v. United States*, 80-Civ-0401 (GLG) (S.D.N.Y. Feb. 26, 1981) JA-6

E. Opinion, *Keene Corp. v. United States*, 80-Civ-0401 (GLG) (S.D.N.Y. Feb. 26, 1981) . JA-41

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Keene I

United States Claims Court
(originally United States Court of Claims)
No. 579-79C

DATE	EVENT
Dec. 21, 1979	Original petition filed
Aug. 1, 1980	Defendant's motion for summary judgment filed
May 1, 1980	Order denying defendant's motion for summary judgment
April 20, 1984	Defendant's motion to consolidate actions for discovery filed
Jan. 30, 1987	Order directing defendant to file any motion under 28 U.S.C. § 1500 (1982) with respect to 465-83C and related cases by February 28, 1987
Feb. 3, 1987	Transcript of oral argument held on Jan. 30
March 2, 1987	Defendant's motion to dismiss filed
April 6, 1987	Order granting defendant's motion to dismiss as to Johns-Manville's claims unless plaintiffs file report on dismissal of pending district court cases
Nov. 16, 1988	Defendant's motion to dismiss filed
Dec. 15, 1988	Plaintiff's opposition to defendant's motion for summary judgment, Exhibit 4, Appendix E (Amended Complaint, *Keene Corp. v. United States*, No. 80-0401 (S.D.N.Y.); and Appendix E, Exhibit 5 (district court opinion in *Keene Corp. v. United States*, No. 80-0401 (S.D.N.Y. Sept. 30, 1981) filed

June 7, 1989	Order granting defendant's motion to dismiss
Jan. 18, 1990	Order vacating judgment of 6/7/89
May 15, 1992	Mandate of the Federal Court of Appeals for the Federal Circuit, affirming Claims Court decision

Keene II

United States Claims Court
(originally United States Court of Claims)
No. 585-81C

Sept. 25, 1981	Original petition filed
April 20, 1984	Defendant's motion to consolidate actions filed by Johns-Manville, et al.
Jan. 30, 1987	Order directing defendant to file motion to dismiss under 28 U.S.C.S. 1500 (1982) with respect to 465-83C and related cases
March 2, 1987	Defendant's motion to dismiss filed
April 6, 1987	Order granting defendant's motion to dismiss Johns-Manville's claims
Nov. 16, 1988	Defendant's motion for summary judgment filed
Dec. 15, 1988	Memorandum of Keene Corp. in opposition to defendant's motion for summary judgment, Exhibit 4, Appendix E (Amended Complaint), *Keene Corp. v. United States*, No. 80-0401 (S.D.N.Y.), Appendix E, Exhibit 5 (District Court opinion in *Keene Corp. v. United States*, No. 80-0401 (S.D.N.Y. Sept. 30, 1981)) filed

June 1, 1989	Opinion granting defendant's motion
June 7, 1989	Judgment
Jan. 18, 1990	Order vacating judgment of 6/7/89
May 15, 1992	Mandate of the Court of Appeals for the Federal Circuit affirming Claims Court decision

IN THE UNITED STATES COURT OF CLAIMS

No. 579-79C

FILED
MAY 1 1981
COURT OF CLAIMS

KEENE CORPORATION

v.

THE UNITED STATES

Paul C. Warnke, attorney of record, for plaintiff. *Harold D. Murry, Jr.*, *Don Scott De Amicis*, *Clifford & Warnke*, *Jerold Oshinsky*, and *Anderson Baker Kill & Olick*, of counsel

Paul M. Honigberg, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant. *Andrea Salloom* and *Esther G. Boynton*, of counsel.

Before DAVIS, NICHOLS and SMITH, *Judges*.

ORDER

PER CURIAM: This case comes before this court on (1) defendant's motion for summary judgment and (2) plaintiff's motion for leave to file its first amended petition. Oral argument has been had and the court has also considered all the various written submissions. On the presentation made to us we are satisfied that (a) there are disputed issues of material fact which cannot be adequately resolved on the slight record before us or by judicial notice at this stage, and which therefore call for further proceedings in the Trial Division (including consideration of those matters (if any) which may be appropriately noticed judicially) and (b) the first amended perition states a claim cognizable by this court if proved, and therefore should be filed. Accordingly, it is ordered that defendant's motion for summary judgment is denied without prejudice, plaintiff is granted leave to file its first amended petition, the first amended petition is accepted for filing and the case is returned to the Trial

Division for further proceedings on the amended petition.[1] Though we have decided that the amended petition survives the equivalent of a motion to dismiss, the trial judge has full authority, in his discretion, to order a more definite statement or to take such other action as he deems appropriate to focus the issues more clearly or definitely. The trial judge also continues to have, of course, the full authority granted him by the rules.

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[1] Plaintiff's motion for leave to file its supplemental memorandum in opposition to defendant's motion for summary judgment is granted and we have considered it. As indicated at the oral argument, defendant has already been granted leave to file a memorandum in response to plaintiff's supplementary memorandum. Defendant has filed such a reply and we have also considered it.

MAY 1 - 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEENE CORPORATION,	:	Civil Action No.
	:	80-Civ.-0401GLG
Plaintiff,	:	
-against-	:	AMENDED
	:	COMPLAINT
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

Plaintiff, Keene Corporation, by and through its attorneys, Anderson Russell Kill & Olick, P.C., for its complaint, alleges upon knowledge with respect to its own acts and upon information and belief as to all other matters, as follows:

COUNT I

Nature of the Claim

1. This complaint seeks damages and other relief against the United States of America for injury, indemnity, contribution or apportionment arising from negligent or wrongful acts or omissions of or breaches of duty by said defendant.

Jurisdiction and Keene's Identity

2. Plaintiff Keene Corporation ("Keene") is a corporation organized under the laws of New York and has its principal place of business at 200 Park Avenue, New York, New York.

3. Jurisdiction arises under 28 U.S.C. §§1346(b) and 2671 *et seq.*, alternatively, under the general admiralty and maritime law of the United States of America, 28 U.S.C. §1333, the Suits in Admiralty Act, 46 U.S.C. §§741-52, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740, and the Public Vessels Act, 46 U.S.C. §781-90, and, alternatively, under 28 U.S.C. §1331 and the common law.

4. Ehret Magnesia Manufacturing Company ("Ehret") was formed in Pennsylvania in 1899. Baldwin-Hill Company was formed in New Jersey in 1935. Baldwin-Ehret-Hill, Inc. ("B-E-H") was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret and Baldwin-Hill Company. B-E-H and its predecessors, Ehret and Baldwin-Hill, manufactured and sold thermal insulation products, some of which contained asbestos fibers.

5. In February 1968, Keene acquired substantially all of the outstanding stock of B-E-H, making B-E-H a subsidiary of Keene. B-E-H was operated as a Keene subsidiary until 1970.

6. In January 1970, there was a statutory merger between B-E-H and a wholly-owned subsidiary of Keene named Keene Building Products Corporation ("KBPC"). KBPC continued to operate the businesses of B-E-H as a subsidiary of Keene.

7. In October 1974, KBPC transferred a substantial portion of its assets and liabilities of Keene. The transferred liabilities included only those which were known and which related to the manufacture and installation of thermal insulation products. Those retained by KBPC related to the manufacture of certain noise control products and had nothing whatsoever to do with insulation products. Subsequent to the transfer of assets and liabilities but still in October 1974, the stock of KBPC was sold to a third party, KBPC thus ceasing to be a subsidiary of Keene. The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations and all but one manufacturing plant of the Keene Insulation and Contracting Division were sold or closed. Keene, apart from its subsidiary, has never and does not now make or sell any thermal insulation products containing asbestos.

Keene's Injury

8. More than 6,000 lawsuits have been commenced against Keene, KBPC and/or its predecessors by persons alleging personal injury or death from inhalation of asbestos fibers contained

in thermal insulation products allegedly manufactured or sold by B-E-H or KBPC, or their predecessors.

9. Keene has denied and continues to deny the allegations of all complaints which seek to impose upon it damages as a result of the sale or use of products containing asbestos fibers. Notwithstanding such denial, a court may nevertheless impose liability upon Keene, and because of the very expensive, uncertain and time-consuming nature of litigation, Keene has been compelled to enter and will continue to enter into reasonable settlements in appropriate cases. In addition, as a result of such actions, Keene has and will continue to incur expenses, including increased expenses relating to insurance coverage, and has and will be compelled to pay reasonable sums to defend such actions.

10. Keene has presented its claims herein to the appropriate agencies of the defendant.

11. By letter dated July 27, 1979, defendant, by its Department of Justice, rejected these claims.

The Nature of the Claims Against Keene

12. In the actions against Keene the plaintiffs (hereinafter referred to as the "claimants") have alleged exposure to asbestos fibers over their work histories commencing as early as the mid-1930's.

13. (a) Most of the claimants were involved in installing high temperature thermal insulation around pipes and boilers on naval ships, on vessels in navigable waters, and in power plants and other industrial and commercial plants, including refineries.

(b) Various claimants have alleged that at the times relevant herein, they were engaged in maritime employment and in performing shipbuilding and ship repair on board ships in navigable waters of the United States.

(c) Various claimants have alleged that at the times relevant herein, they were engaged in maritime employment and

in performing shipbuilding and ship repair on shore alongside ships in navigable waters of the United States.

14. Most of the claimants who engaged in the installation of thermal insulation were either employees of the defendant working in U.S. naval shipyards or employees working in private shipyards under contract to the U.S. Navy, an agency of the United States.

15. In the actions against Keene the complaints typically have alleged that:

(a) the claimant worked with or around thermal insulation products containing asbestos;

(b) in the course of his work the claimant cut asbestos-containing thermal insulation with a saw or a knife, ripped out old asbestos-containing thermal insulation preparatory to installing new such insulation, and/or mixed asbestos-containing cement prior to application;

(c) all of the foregoing activities created airborne dust, containing asbestos fibers;

(d) the claimant inhaled such dust; and

(e) such inhalation caused asbestosis or other harmful conditions.

Relationship Between Keene and the Defendant

16. At the times relevant herein, defendant United States of America owned and operated naval shipyards for the construction and repair of its naval vessels, in which various claimants were employed at times that they were incurring their alleged injuries.

17. At the times relevant herein, defendant also utilized private shipyards for the construction and repair of its naval vessels (hereinafter "contract shipyards"), in which various claimants were employed at times that they were incurring their alleged injuries.

18. In both its own naval shipyards and in its contract shipyards, defendant supervised and regulated the labor practices of the workers employed therein and determined and specified the manner and application of products containing asbestos in its naval vessels.

19. Defendant promulgated health standards and minimum safety requirements for both its own shipyards and its contract shipyards, and conducted industrial health inspections of such shipyards for the purpose of determining the existence of any safety hazards therein.

20. At the times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by its naval shipyards or its contract shipyards, for use in its naval vessels.

21. At the times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by defendant or by private parties for use in projects, either funded by defendant, in whole or in part, or otherwise subject to defendant's control and regulation, on which claimants may have been employed.

22. As used herein, the term "control" shall be given its usual and accepted meaning, including, but not limited to, the circumstance that if defendant could require the use of asbestos-containing thermal insulation at any facility, that facility was subject to defendant's control.

23. At times relevant herein, defendant sold asbestos to KBPC and its predecessors.

24. KBPC and its predecessors incorporated the asbestos purchased from defendant into certain of their thermal insulation products without any alteration of such asbestos.

25. At times relevant herein, KBPC and its predecessors sold their thermal insulation products, incorporating asbestos purchased from the defendant, to defendant and to others.

26. KBPC and its predecessors used the asbestos supplied to them by the defendant in the manner for which said asbestos was intended or in a manner reasonably foreseeable by the defendant.

27. The claimants have alleged injury from exposure to thermal insulation which allegedly contained asbestos fibers supplied to KBPC and its predecessors by the defendant.

28. The allegations comprising the factual background set forth in paragraphs 29 through 75 below were for the most part unknown to Keene and KBPC and its predecessors until after the proceedings alleged herein had been initiated by the claimants.

Factual Background

29. Beginning at least as early as 1934, the defendant had been provided with a draft study indicating that exposure to asbestos dust caused a pulmonary fibrosis which was demonstrable on X-ray films.

30. In or about January 1935, the U.S. Public Health Service, an agency of the defendant, published this study on the negative effects of the inhalation of asbestos dust on the lungs of workers in the asbestos textile industry.

31. Nevertheless, in 1934, the U.S. Navy commenced the development of asbestos insulating materials.

32. By 1937, defendant had adopted the use of insulating materials containing asbestos in its naval vessels.

33. In or about 1938, the U.S. Public Health Service published a study of asbestosis in the asbestos textile industry. The objectives of the study were: to determine the effects of long-continued inhalation of asbestos dust on the human body; to identify the manufacturing processes that create dust; to recommend practices, and, when necessary, equipment, that would reduce the

dust exposure of workers; and to discover what concentrations of asbestos dust, if any, could be tolerated without injury to health. This study concluded that:

(a) asbestos dust exposure could be held responsible for the cases of pneumoconiosis that had been found in textile factories; and

(b) because clear-cut cases of asbestosis were found only in conjunction with dust concentrations exceeding 5 million particles per cubic foot ("p.p.c.f."), and not at lower concentrations, until better data were available, 5 million p.p.c.f. could be regarded as the threshhold limit value ("TLV") for asbestos dust exposure in asbestos factories.

34. The above study urged precautionary measures and elimination of hazardous exposures as follows:

(a) dust control at the point of origin by means of local exhaust hoods so that no dust could reach the breathing zone of workers or contaminate the general air;

(b) clean air should replace the dust-laden air removed by the exhaust systems;

(c) workers entering rooms where dust conditions existed should be equipped with approved respirators; and

(d) periodic studies of the condition of the working environment should be conducted to determine whether existing control methods remained adequate.

35. At least as early as 1940, defendant was aware of the hazards of asbestos dust exposures to insulation workers employed in its naval shipyards and was conducting X-ray examinations of the lungs of such workers for evidence of asbestosis. These X-rays revealed peripheral lung markings which increased over time.

36. At least as early as January 1941, the U.S. Department of Interior, Bureau of Mines, an agency of the defendant, published a list of approved respirators for protection against the inhalation of pneumoconiosis-producing dusts such as asbestos.

37. The Second World War marked the beginning of a concentrated construction program to build combat and other vessels necessary for the war effort. In 1943, defendant's shipyards employed 1,750,000 civilians. It has been estimated that altogether from 3 to 3.5 million civilians worked in defendant's shipyards during the Second World War.

38. In 1942, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial hygiene, adopted the 5 million p.p.c.f. TLV first proposed by the U.S. Public Health Service in 1938.

39. Some time prior to December 1942, the U.S. Maritime Commission, an agency of the defendant, and the U.S. Navy concurred that too little attention had been paid to matters involving the health and safety of shipyard employees and decided to conduct a survey for the purpose of developing standards to govern the health of shipyard employees throughout the United States. Dr. Phillip Drinker of the Department of Industrial Hygiene, School of Public Health, Harvard University, and representatives of the U.S. Navy Bureau of Medicine and Surgery toured shipyards throughout the United States for the purpose of presenting to the shipyard industry, including the Navy, minimum standards for the protection of the health of shipyard employees.

40. In or about December 1942, as a result of the tour by Dr. Drinker and his associates, it was determined, *inter alia*, that:

(a) asbestosis had occurred in shipyards utilized for the construction or refitting of defendant's naval vessels and was likely

to occur again because asbestos was being handled with little or no precautions by insulation workers;

(b) the preventative programs then employed in such shipyards had been ineffective; and

(c) the asbestos health hazard could be controlled by enforcing appropriate ventilation standards in conjunction with mandatory, periodic examinations of shipyard employees.

41. In February 1943, the U.S. Navy and the U.S. Maritime Commission promulgated "Minimum Requirements for Safety and Health in Contract Shipyards". This report specifically identified asbestosis as a hazard of any operation which gave rise to asbestos dust, but asserted that such operations could be performed safely by isolating them, providing ventilation, requiring the operators to wear respirators, and conducting periodic medical examinations.

42. Pursuant to the above report, each shipyard holding contracts with the U.S. Navy and Maritime Commission was given notice that the Maritime Commission would make available safety and industrial health consultants charged with the coordination and supervision of the safety and health programs of the two agencies and that each such shipyard was to cooperate with the assigned consultants and to fully comply with the promulgated minimum standards. These standards required, *inter alia*, the:

(a) appointment of a full time safety director and support staff for each contract shipyard;

(b) appointment of a ventilation supervisor for each shift, responsible to the safety director;

(c) exhaust ventilation adequate to remove hazardous air impurities;

(d) protective respiratory equipment for jobs involving asbestos-containing material; and

(e) assignment of his own, individual respirator to each worker requiring one.

43. During the Second World War and immediately thereafter, despite the issuance of the Minimum Requirements, the problem of asbestos dust inhalation was given low priority by defendant, and the operational control of occupational health hazards varied from shipyard to shipyard.

44. During the Second World War, neither the Navy nor the Maritime Commission enforced their own minimum requirements. This laxity and indifference carried over into the postwar era.

45. In or about 1945, a study was conducted by health consultants from the U.S. Navy and Maritime Commission of the health conditions of workers installing asbestos insulation in both government and contract shipyards.

46. This study indicated that the minimum requirements promulgated in 1943 were being violated in all of the shipyards surveyed. Exhaust ventilation was for the most part non-existent or inadequate and respirators were worn by few if any workers. The asbestos dust concentrations were far in excess of the 5 million p.p.c.f. TLV first suggested by the Public Health Service in 1938.

47. The above study again recommended that adequate exhaust ventilation and respirators were necessary to the maintenance of a low incidence of asbestosis.

48. In 1946 and 1947, the American Conference of Governmental Industrial Hygienists again recommended that the TLV for dust containing asbestos should be below 5 million p.p.c.f.

49. During the early 1950's, considerable ship modernization was undertaken in both Navy and contract shipyards, resulting in extensive worker exposure to dust from ripped-out thermal insulation containing asbestos. During this period, defendant took few if any precautions on behalf of the insulation workers.

50. The October 1962 issue of the Navy's "Safety Review" published findings that adequate precautions had not been taken at naval shipyards to protect workers against asbestosis and that shipyard insulation employees were engaged in a hazardous trade.

51. In May-June 1964, the head of the Medical Department, Long Beach Naval Shipyard ("LBNS"), stated that adequate ventilation for insulation workers was not possible to achieve with the ventilating systems available at LBNS and the workers were therefore exposed to hazardous dust counts which had resulted in asbestosis.

52. In and around 1964, dust counts made at the Norfolk Naval Shipyard ("NNS") revealed that insulators were exposed to levels of 5-50 million p.p.c.f. and occasionally higher. Recommendations of the Industrial Hygiene Division at NNS for improvement of these conditions were being ignored and had been for some time and it was unknown whether workers were wearing respirators, or wearing them in a proper manner.

53. In June 1965, NNS measured dust counts during the rip-out of asbestos insulation from naval ships. Dust counts ranging from 30 to 115 million p.p.c.f. were recorded in the breathing zone.

54. In 1965, an epidemiological study of asbestosis among insulation workers in the United States was undertaken. Evidence of pulmonary asbestosis was found in almost half the workers examined. Among those with more than forty years experience, abnormalities were found in over ninety percent. This study concluded that the installation of asbestos-containing insulation was a hazardous occupation.

55. In 1968, the American Conference of Governmental Industrial Hygienists determined that the TLV for asbestos dust should be reduced to 2 million p.p.c.f.

56. In March 1968, a study of the Industrial Hygiene Division of the San Francisco Bay Naval Shipyard ("SFBNS") indicated that insulators were being exposed to asbestos dust concentrations above the TLV then extant, during various shipboard operations, including cutting, sawing and rip-out.

57. In December 1968, the Portsmouth Naval Shipyard ("PNS") conducted an investigation of the control of asbestos dust. This investigation revealed a dust problem in the shop area, although PNS officials believed that it could be reduced to an acceptable level. Asbestos dust control aboard ship was very limited in spite of the PNS medical department's expression of strong reservations concerning this condition.

58. In February 1969, the Chief of the Navy's Bureau of Medicine and Surgery sent a letter to the Chief of Naval Operations, advising him that reports from naval shipyards indicated continuing problems concerning the control of airborne asbestos and recommended that the industrial hygiene sections of the shipyards conduct surveys for the purpose of evaluating the effectiveness of ventilation control and respiratory protective devices. Later that same year, the Bureau of Medicine and Surgery opined that even one heavy exposure to asbestos dust could be injurious.

59. In or about March 1969, dust counts taken at the Pearl Harbor Naval Shipyard ("PHNS") indicated asbestos dust exposure levels from 12 to 68 million p.p.c.f. during various operations including cutting, sawing and rip-out.

60. Later in 1969, a Navy survey of both government and contract shipyards was published, indicating that in every instance yard management was aware of the hazards attending the use of asbestos insulating materials, but had failed to exercise sufficient care necessary to seek to abate the problem.

61. This report further indicated that the wearing of respirators was not generally enforced and that dust counts were excessive due to inadequate exhaust ventilation and other improper practices.

62. The above report concluded: that considerable asbestos-containing insulation material currently was being used in naval applications; that stringent handling precautions were not being enforced; and that the use of high asbestos-containing thermal insulating materials should be curtailed due to the hazards to the health of insulation workers.

63. Recognition of the occupational health problems posed by asbestos and other physically harmful substances in part led to the passage of the Occupational Safety and Health Act of 1970 ("OSHA").

64. In February 1971, the Commander, Naval Ship Systems Command, ordered elimination of high asbestos-containing materials for all new construction, and provided that for present contracts, the charge would be issued as a full priced supplemental agreement which would result in no increase in cost and no extension of delivery dates.

65. In September 1971, the U.S. General Services Administration indicated to the Navy that it had a substantial amount of asbestos-containing material and asked the Navy not to eliminate GSA as a source of such materials.

66. During 1971 and 1972, dust counts at the PHNS and the LBNS continued to reveal asbestos dust levels well in excess of the then current TLV.

67. In 1972, the National Institute for Occupational Safety and Health adopted a new TLV in connection with OSHA. Under this new standard, which was also adopted by the Navy, exposures were limited to 2 asbestos fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length. Peak concentrations were not to exceed 10 fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length.

68. During 1974, naval shipyards continued to stock, order and use insulating material containing asbestos, although acceptable substitutes were available.

69. In 1975, dust counts at the Puget Sound Naval Shipyard ("PSNS") revealed asbestos dust levels far in excess of the TLV adopted in connection with OSHA.

70. As late as February 1977 through March 1978, the Navy concluded that the asbestos control procedures in its shipyards continued to be inadequate. Subsequently, in 1979, a study published by defendant's Comptroller General concluded that the Navy continued to take inadequate precautions to protect employees in its shipyards from asbestos exposures in excess of the OSHA standard.

71. Throughout the period 1974 and thereafter, the LBNS, the PSNS, the NNS, the Boston Naval Shipyard and other government shipyards, as well as contract shipyards, reported numerous cases of asbestosis and other harmful conditions.

72. During the times relevant herein, defendant believed that the inhalation of asbestos laden dust might cause asbestosis and other harmful conditions. Defendant further believed that the danger could be controlled by maintaining a modest level of exposure.

73. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fibers and the improper manner in which asbestos-containing thermal insulation was being utilized and installed in facilities subject to its control and regulation in violation of its own safety standards.

74. Defendant's programs to prevent asbestosis and other harmful conditions among insulation workers in facilities subject to its control and regulation have been haphazard, inadequate and/or unenforced.

75. During the times relevant herein, defendant had the duty to protect workers, including claimants, employed in facilities subject to its control and regulation, from asbestosis and other harmful conditions, but failed to exercise a sufficient degree of care to do so.

Allegations Against the Defendant

76. Defendant, as a supplier of asbestos fiber incorporated unchanged into thermal insulation products manufactured by KBPC and its predecessors, had a duty to KBPC and its predecessors to supply a safe component.

77. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials vastly exceeded that of KBPC and its predecessors.

78. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fiber.

79. Defendant breached its above duty to KBPC and its predecessors to supply them with safe component materials.

80. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its independent duty to KBPC and its predecessors by means of negligent or wrongful acts or omissions.

81. By reason of the foregoing breach of defendant's independent duty to KBPC and its predecessors, defendant is liable to Keene for any amounts which have been, or which may be, recovered from Keene by the claimants, through settlement or judgment, and for the costs incurred by Keene as a result of the proceedings initiated by the claimants, including, but not limited to, attorneys' fees, increased insurance costs and the cost of executive time expended on such claims.

COUNT 2

82. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

83. As a supplier of asbestos fiber incorporated unchanged into thermal insulation products manufactured by KBPC and its predecessors, defendant warranted that such asbestos fiber was safe to use for this purpose.

84. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials vastly exceeded that of KBPC and its predecessors.

85. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

86. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached since the asbestos fiber supplied by defendant to KBPC and its predecessors was not safe for its intended and foreseeable use.

87. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 3

88. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

89. Defendant had the duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

90. The above duty imposed upon defendant the further duty to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos-containing thermal insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health safety standards.

91. Consequently, defendant owed KBPC and its predecessors the independent duty to assure that asbestos-containing thermal insulation, manufactured by them and used in any facility subject to defendant's control or regulation, was used in a safe manner.

92. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its

aforementioned duties owed to KBPC and its predecessors. Defendant further breached a similar duty owed to said claimants.

93. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 4

94. Keene repeats and realleges the allegations set forth above in paragraphs 1 to 75, inclusive.

95. Defendant, in its capacity as the employer of its independent contractors, had the duty to warn the claimant-employees of its independent contractors of any known hazards of their employment and assure that precautions were taken for their health and safety.

96. Consequently, defendant owed KBPC and its predecessors the independent duty to assure that asbestos-containing thermal insulation, manufactured by them and used by claimants employed by defendant's independent contractors, was so used in a safe manner.

97. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its aforementioned duties owed to KBPC and its predecessors. Defendant further breached a similar duty owed to said claimants.

98. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 5

99. Keene repeats and realleges the allegations set forth above in paragraphs 1 to 75, inclusive.

100. Defendant, at various times relevant herein, has inspected facilities at which claimants were employed to determine whether any safety hazards existed at said facilities or in any of the thermal insulation products containing asbestos fibers located or installed therein.

101. Having undertaken to conduct such inspections, defendant assumed the duty to conduct them in a reasonable manner.

102. Consequently, defendant owed KBPC and its predecessors the independent duty to determine that asbestos-containing thermal insulation, manufactured by them and used by claimants at the various facilities inspected by defendant, was so used in a safe manner. Defendant owed a similar duty to said claimants.

103. KBPC and its predecessors relied on defendant to conduct such inspections in a reasonable manner.

104. Said inspections were conducted in a careless and negligent fashion, including defendant's failure to warn KBPC and its predecessors and the various claimants or their employers of the allegedly hazardous and dangerous character of asbestos-containing thermal insulation.

105. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its aforementioned duties owed to KBPC and its predecessors. Defendant further breached a similar duty owed to said claimants.

106. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 6

107. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

108. Defendant, at various times relevant herein, has inspected its naval and contract shipyards and other facilities subject to its control and regulation at which claimants were employed, to determine whether any cognizable safety hazards existed at said facilities or in any of the products containing asbestos fibers located or installed therein.

109. By conducting such inspections, and having the authority to regulate the working conditions at such facilities, defendant

warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant and others by KBPC and its predecessors and used at such facilities, would be installed or otherwise handled in a safe manner.

110. KBPC and its predecessors relied on this warranty.

111. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation used at the foregoing facilities was installed or otherwise handled in a safe manner.

112. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 7

113. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

114. Defendant, as the designer and issuer of the specifications requiring the use of asbestos fiber in thermal insulation products manufactured by KBPC and its predecessors for use on defendant's naval vessels and in facilities subject to defendant's control and regulation, undertook the duty to KBPC and its predecessors to design and issue a safe thermal insulation material.

115. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant performed its design and issuance functions in a negligent manner and breached its duty to KBPC and its predecessors.

116. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 8

117. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

118. As the designer and issuer of the specifications requiring the use of asbestos in thermal insulation manufactured by KBPC and its predecessors and intended for use on defendant's naval vessels and in facilities subject to its control and regulation, defendant warranted that if its specifications were complied with, satisfactory performance would result, and that thermal insulation containing asbestos, manufactured to defendant's specifications, was safe for its intended use.

119. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

120. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

121. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's specifications were defective and defendant's warranty was false and was breached by reason of the fact that the asbestos-containing thermal insulation, manufactured pursuant to defendant's specifications, was not safe for its intended and foreseeable use.

122. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 9

123. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

124. Asbestos-containing thermal insulation, manufactured by KBPC and its predecessors and used in defendant's naval shipyards, its contract shipyards, or other facilities, was purchased by defendant from KBPC and its predecessors and then supplied by defendant to all such shipyards or other facilities.

125. Defendant knew or had reason to know that said asbestos-containing thermal insulation was allegedly dangerous for its intended use.

126. Defendant may not have had any reason to believe that the asbestos insulation workers, for whose use said asbestos-containing thermal insulation was being supplied, would realize its allegedly dangerous character.

127. Defendant failed to exercise its duty of reasonable care to warn such asbestos insulation workers, including claimants, of the allegedly dangerous condition of the asbestos-containing thermal insulation which defendant was supplying them.

128. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 10

129. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

130. Defendant had the duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

131. As the party which required its independent contractors to use asbestos-containing thermal insulation at various facilities, with knowledge of its alleged danger, defendant also had the duty to see that its independent contractors took the necessary precautions to protect the health of their asbestos insulation workers, including claimants, for any hazards attendant on the use of asbestos.

132. The above duties imposed upon defendant the obligation to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos-containing thermal insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health and safety standards.

133. As the party responsible for regulating the work practice of all such claimants and for providing them with a safe place to work, or assuring that they were so provided, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant and others by KBPC and its predecessors and used at facilities subject to defendant's regulation and control, would be installed and otherwise handled in a safe manner.

134. KBPC and its predecessors relied upon this warranty.

135. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation, used in facilities subject to its control and regulation, was installed or otherwise handled in a safe manner.

136. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 11

137. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

138. The defendant was negligent in that it:

(a) failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fiber and thermal insulation containing asbestos fiber;

(b) required the inclusion of asbestos fiber in thermal insulation materials used at facilities subject to its control and regulation;

(c) supplied KBPC and its predecessors with asbestos fiber for incorporation in certain of their products;

(d) supplied claimants employed at facilities subject to its control and regulation with asbestos-containing thermal insulation, without warning of its allegedly dangerous character;

(e) failed to provide claimants in its employ or employed at facilities subject to its control and regulation with a safe place to work;

(f) failed to warn the claimant-employees [sic] its independent contractors of the alleged hazards associated with handling asbestos-containing thermal insulation, or to assure that the requisite precautions were taken to protect their health;

(g) failed to conduct its inspections of facilities at which claimants were employed with reasonable care;

(h) designed, specified and issued the specifications requiring the use of asbestos fiber;

(i) promulgated a TLV for exposure to asbestos dust and was consequently under a duty to KBPC and its predecessors to promulgate a safe TLV and to enforce such a TLV, which it negligently failed to do; and

(j) failed to conduct its medical examinations of claimants, including x-rays, with reasonable care.

139. Plaintiff has been damaged by said negligence of defendant.

140. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 12

141. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 80, 83-86, 89-92, 95-97, 100-105, 108-111, 114-115, 118-121, 124-127, 130-135, 138-139, inclusive.

142. Defendant had a duty to claimants using asbestos-containing thermal insulation, manufactured by KBPC and its

predecessors, to supply KBPC and its predecessors with safe component materials, to provide a safe work place for claimants, to warn claimants in its employ and in the employ of its independent contractors, to inspect the facilities controlled by it, and to specify a safe product for claimants' use.

143. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant negligently breached its above duties to such claimants and defendant is liable to Keene for the damages alleged above in paragraph 81, since any liability of Keene based on negligence involves negligence which is secondary and passive to the active and primary negligence of defendant, who:

(a) prescribed the use of asbestos fibers in thermal insulation materials manufactured by KBPC and its predecessors for use at facilities owned by defendant, or subject to its control or regulation;

(b) supplied KBPC and its predecessors with asbestos fibers;

(c) was responsible for the health and safety of employees handling asbestos-containing thermal insulation in facilities owned by it, or subject to its control or regulation;

(d) without the requisite warning, supplied to these claimants the asbestos-containing thermal insulation which allegedly caused their injuries;

(e) was obligated to warn claimants in the employ of its independent contractors of any dangers associated with handling asbestos and to take the necessary precautions for their health and safety; and

(f) failed to conduct the aforementioned inspections with reasonable care.

144. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 13

145. Keene repeats and realleges the allegations set forth above in paragraphs 141 through 143, inclusive.

146. Defendant knew, or in the exercise of reasonable care should have known, that its asbestos and its specified products would be sold to the public, including employers of claimants, would be used by claimants and would be relied upon by such persons to be fit both for the use and the accomplishment of the purpose for which they were sold, supplied, distributed or otherwise placed in the stream of commerce; and the defendant, because of its position as seller and specifier, is strictly liable to Keene for the following reasons:

(a) Defendant, as seller and specifier, at relevant times was engaged in the business, *inter alia*, of selling asbestos and specifying asbestos products;

(b) At the time of the sale of the said asbestos and the specification of asbestos products by the defendant, defendant knew, or had reason to know, that the said asbestos would be used by KBPC and its predecessors as a user or consumer and that said asbestos and the products manufactured by KBPC and its predecessors pursuant to said specifications would be used by claimants as the ultimate users and consumers;

(c) Defendant sold the said asbestos products in a defective condition, unreasonably dangerous to KBPC and its predecessors, to others similarly engaged as users or consumers, and to the claimants as ultimate users and consumers, and throughout the many years of the claimants' exposure to and use of the said asbestos and specified products, the said asbestos and specified products were expected to and did reach the ultimate users or consumers without substantial change in the condition in which they were sold;

(d) Claimants have alleged that the said asbestos and specified products were defective in that they are incapable of being made safe for their ordinary and intended use and purpose, and said

defendant failed to give adequate or sufficient warnings or instructions about the risks, dangers, and harm inherent in said asbestos and specified products; and

(e) Claimants have alleged that the ordinary and foreseeable use of the said asbestos and specified products is an intrinsically dangerous and ultrahazardous activity.

147. If Keene is deemed liable to claimants for the injuries alleged in their complaints, then defendant is liable to Keene in strict liability.

148. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 14

149. Keene repeats and realleges the allegations set forth above in paragraphs 145 through 147, inclusive.

150. Defendant is not protected by sovereign immunity for the acts set forth above and has breached its duties to Keene under the common law.

151. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 15

152. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

153. In 1971 and on other prior occasions, KBPC and its predecessors purchased asbestos fiber from defendant, pursuant to express contracts.

154. As a supplier of asbestos fiber incorporated uncharged into thermal insulation products manufactured by KBPC and its predecessors, defendant warranted that such asbestos fiber was safe to use for this purpose.

155. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

156. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

157. Defendant had a duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

158. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that the asbestos fiber, supplied by defendant to KBPC and its predecessors, was not safe for its intended and foreseeable use.

159. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

160. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 16

161. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

162. KBPC and its predecessors sold thermal insulation containing asbestos to defendant, pursuant to express contracts.

163. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

164. Defendant had the further duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

165. As the party which required its independent contractors to use asbestos-containing insulation at various facilities, with knowledge of its alleged danger, the defendant also had the duty to see that its independent contractors took the necessary precautions to protect the health of their asbestos insulation workers, including claimants, from any hazards attendant on the use of asbestos.

166. The above duties imposed upon defendant the obligation to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health and safety standards.

167. As the party responsible for regulating the work practice of said claimants and for providing them with a safe place to work, or assuring that they were so provided, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant by KBPC and its predecessors for use at facilities subject to defendant's control and regulation, would be installed and other wise [sic] handled in a safe manner.

168. KBPC and its predecessors relied upon this warranty.

169. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation, used in facilities subject to its control and regulation, was installed or otherwise handled in a safe manner.

170. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

171. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 17

172. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

173. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

174. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

175. Defendant, at various times relevant herein, has inspected its naval and contract shipyards and other facilities subject to its control and regulation at which claimants were employed, to determine whether any safety hazards existed at said facilities or in any of the products containing asbestos fibers loclated [sic] or installed therein.

176. By conducting such inspections, and having the authority to regulate the working conditions at such facilities, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant by KBPC and its predecessors for use at such facilities, would be installed or otherwise handled in a safe manner.

177. KBPC and its predecessors relied upon this warranty.

178. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation, used at the foregoing facilities, was installed or otherwise handled in a safe manner.

179. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

180. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 18

181. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

182. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

183. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

184. As the designer and issuer of the specifications requiring the use of asbestos in thermal insulation, manufactured by KBPC and its predecessors and intended for use on defendant's naval vessels and in facilities subject to its control and regulations, defendant warranted that if its specifications were complied with, satisfactory performance would result, and that thermal insulation containing asbestos, manufactured to defendant's specifications, was safe for its intended use.

185. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

186. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

187. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's specifications were faulty and defendant's warranty was false and was breached by reason of the fact that the asbestos-containing thermal insulation, manufactured pursuant to defendant's specifications, was not safe for its intended and foreseeable use.

188. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty

would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

189. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 19

190. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

191. The amounts which have been and will be paid by Keene to claimants in settlements and judgments should rightly be paid by defendant, since such amounts compensate claimants for injuries which resulted from defendant's negligent or wrongful acts or omissions or breaches of duty.

192. Defendant asserts that its liability to claimants who were Government employees is limited to the compensation payable under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§8101-8193. Defendant has refused to make any payments to such claimants other than the amounts which it claims it has paid as FECA benefits.

192. Notwithstanding its claim that it has paid FECA benefits to claimants, defendant has recouped and will continue to recoup the amounts of FECA benefits it has paid to such claimants from judgments and settlements which Keene has paid to claimants. Defendant has thus relieved itself of any responsibility for compensating claimants who were Government employees for their alleged injuries, notwithstanding defendant's significant role in causing those very injuries.

194. Since defendant's conduct caused the alleged injuries which have resulted in settlements and judgments which Keene has paid to claimants, defendant is unjustly enriched by its retention of monies paid to claimants by Keene and refunded to defendant under FECA, 5 U.S.C. §8132, and under related regulations, 20 C.F.R. §10.503.

195. By reason of the foregoing, defendant is liable to Keene for any amounts it has recouped pursuant to FECA and the aforementioned regulations.

COUNT 20

196. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

197. Defendant owes Keene the amount of money which has been refunded to defendant from claimants, for money had and received.

COUNT 21

198. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

199. Defendant's recoupment of FECA benefits it has paid to claimants from judgments and settlements paid by Keene to claimants is a direct and proximate cause of damages and injury suffered by Keene, since such recoupment increases the cost to Keene of such settlements and judgments.

200. By reason of the foregoing, defendant is liable to Keene for the amounts of money which have been, or which may be, recouped by defendant from claimants from judgments and settlements paid by Keene to claimants.

COUNT 22

201. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

202. Defendant's recoupment of FECA benefits constitutes a taking of Keene's property without due process of law in violation of Keene's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

203. By reason of the foregoing, defendant is liable to Keene for the amounts of money which have been, or which may be,

recouped by defendant from claimants from judgments and settlements paid by Keene to claimants.

COUNT 23

204. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

205. Without the imposition of judicial restraint, defendant will continue to recover such FECA benefits from claimants, causing Keene to bear the cost of FECA payments which ought to be borne by the defendant, causing Keene irreparable injury for which Keene has no adequate remedy at law.

WHEREFORE, Keene demands judgment against defendant:

(1) for injury, indemnity, contribution or apportionment, for any amounts which have been, or which may be, recovered from Keene by the claimants and for the cost incurred by Keene as a result of the proceedings initiated by the claimants, including, but not limited to, attorneys' fees, increased insurance costs and the cost of executive time expended on such claims, in an amount presently unknown but which is believed to be in excess of $20 million.

(2) ordering defendant to make restitution to Keene by disgorging amounts of FECA benefits which defendant has recouped from amounts claimants have recovered from Keene, through settlement or judgment;

(3) permanently enjoining and restraining the defendant, its agencies, units, divisions, employees, officers, attorneys, agents and any other person acting or purporting to act on behalf of the defendant, from receiving any refunds of FECA payments from settlements or judgments paid to claimants; and

(4) awarding Keene the costs and disbursements of this action together with such other and further relief as to this Court may seem just and appropriate.

Dated: New York, New York
February 26, 1981

ANDERSON RUSSELL KILL & OLICK, P.C.

By /s/ Marcy Louise Kahn
A Member of the Firm

630 Fifth Avenue
New York, New York 10111
(212) 397-9700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEENE CORPORATION,	:	Civil Action No.
	:	80-Civ.-0401
Plaintiff,	:	
-against-	:	
	:	
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

DEMAND FOR A JURY TRIAL

Plaintiff demands a jury trial in the above-referenced action.

ANDERSON RUSSELL KILL & OLICK, P.C.

By /s/ Marcy Louise Kahn
A Member of the Firm
630 Fifth Avenue
New York, New York 10111
(212) 397-9700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEENE CORPORATION,	:	
Plaintiff,	:	
– against –	:	
THE UNITED STATES OF AMERICA,	:	80 Civ. 401 (GLG)
Defendant.	:	OPINION

APPEARANCES:

ANDERSON RUSSELL KILL & OLICK, P.C.
Attorneys for Plaintiff
630 Fifth Avenue
New York, New York 10111
By: Eugene R. Anderson, Esq.
Nicholas L. Coch, Esq.
Irene C. Warshauer, Esq.
Marcy Louise Kahn, Esq.
Frederick L. Neustadt, Esq.
Of Counsel

JOHN S. MARTIN, JR.,
United States Attorney for the
Southern District of New York
Attorney for Defendant
One St. Andrew's Plaza
New York, New York 10007
By: David M. Jones, Esq.
Assistant United States Attorney
Of Counsel

GOETTEL, D. J.:

This action arises out of the proliferation of litigation relating to exposure to asbestos that has saturated federal and state courts throughout the country.[1] Plaintiff Keene Corporation ("Keene") is a defendant in over 6000 lawsuits brought by persons alleging personal injury or death from inhalation of asbestos fibers contained in thermal insulation products alleged to have been manufactured or sold by Keene and its subsidiaries.[2] In this action, Keene seeks indemnity and contribution from the United States from all damages that Keene *may* sustain as a result of these lawsuits.[3] The Government moves to dismiss pursuant

[1] Asbestos is a mineral fiber that appears throughout the world and which is best known for its use as an insulator against heat. It has been recognized for over fifty years that the inhalation of asbestos dust can produce a disease known generally as asbestosis. Asbestosis is technically defined as a form of pneumoceniosis. Although lawsuits arising out of exposure to asbestos are commonly referred to as asbestosis lawsuits, they actually include a variety of diseases such as lung cancer, cancer of the esophagus, cancer of the stomach, and cancer of the colon. For a general description of asbestosis and asbestosis litigation, see *Borel* v. *Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), and the authorities cited therein; *In Re Asbestos & Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977).

[2] Keene alleges that *it* has never manufactured or sold thermal insulation products that contain asbestos. Keene was organized and formed in 1967. In 1968, Keene acquired most of the stock of Baldwin-Ehret-Hill, Inc. ("B-E-H") which, together with its predecessors, *had* manufactured and sold thermal insulation products containing asbestos fiber. In 1970, B-E-H was merged into a newly created Keene subsidiary, Keene Building Products Corporation ("KBPC"). Keene sold the stock of KBPC in 1974.

[3] The gist of Keene's claims against the Government is that the Government utilized asbestos-containing thermal insulation up until 1979 despite the Government's knowledge, allegedly as early as 1938, of the hazards of asbestos. Keene also alleges that the Government had the knowledge and technical skill to prevent worker exposure to excessive dust concentration, but failed to take appropriate action. (The Government has reserved its right, pending decision of this motion, to move to dismiss for failure to state a claim against these novel theories of liability.)

to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Court lacks subject matter jurisdiction over the claims asserted by Keene.

In its amended complaint, Keene alleges twenty-three separate causes of action sounding in negligence, breach of warranty, strict liability, and unjust enrichment, as well as a violation of the Due Process Clause of the United States Constitution. Keene has also brought an action for breach of contract against the Government that is currently pending in the United States Court of Claims.[4] *See Keene Corp. v. United States*, No. 579-79C (Ct. Cl., filed Dec. 21, 1979). Jurisdiction for this action is asserted under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, alternatively under the general admiralty and maritime law of the United States of America, 28 U.S.C. § 1333, the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, and the Public Vessels Act, 46 U.S.C. §§ 781-790, and alternatively, under 28 U.S.C. § 1331 and the common law. Having reviewed the thousands of pages of memoranda and affidavits submitted by the parties in connection with this motion, the Court has determined that this action is barred by the doctrine of sovereign immunity.

The Federal Tort Claims Act

The jurisdictional issue under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, stems from the requirement that the claimant file an administrative claim with the appropriate federal agency prior to instituting suit. 28 U.S.C. § 2675. Section 2675 provides in pertinent part that:

[4] In its petition in the Court of Claims, Keene seeks damages for indemnity and contribution allegedly arising from express and implied contracts between the Government and KBPC. The Court of Claims recently denied a Government motion for summary judgment on the ground that issues of material fact remain in dispute. *See Keene Corp. v. United States*, No. 579-79C (Ct. Cl. May 1, 1981) (per curiam).

> [a]n action shall not be instituted upon a claim against the United States for money . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied. . . . *The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counter claim.* (Emphasis added.)

Keene contends that this action is in "the nature" of a third party complaint and consequently comes under the exception for third party claims. In the alternative, it argues that this administrative filing requirement has been satisfied.

The purpose of the administrative filing requirement is to expedite the settlement of tort claims asserted against the government and to avoid unnecessary litigation. *Adams v. United States*, 615 F.2d 284 (5th Cir.), *rehearing denied*, 622 F.2d 197 (5th Cir. 1980). The exception for third party complaints is consistent with this purpose in that it fosters the policy of the Federal Rules of Civil Procedure favoring resolution of as many claims as possible in one lawsuit. *Raybestos-Manhattan, Inc. v. United States*, No. H-78-416, slip op. at 7 (D. Conn. Feb. 15, 1979); Jacoby, *The 89th Congress and Government Litigation*, 67 Colum. L. Rev. 1212, 1219 (1967). The administrative filing requirement is jurisdictional and cannot be waived. *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *Goulding v. United States*, 488 F. Supp. 755 (D. Ariz. 1980), *rev'd on other grounds sub nom. Poindexter v. United States*, 647 F.2d 35 (9th Cir. 1981). Moreover, because it constitutes a waiver of sovereign immunity, the procedures delineated in section 2675 must be strictly construed. *Three-M Enterprises, Inc. v. United States*, 548 F.2d 293, 295 (10th Cir. 1977); *Brown v. General Services Administration*, 507 F.2d 1300, 1307 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976). Consequently, the exceptions for third party complaints, cross-claims, and counterclaims have likewise been strictly construed. *See, e.g., West v. United States*, 592 F.2d 487 (8th Cir. 1979); *Rosario v. American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227

(3d Cir.), *cert. denied*, 429 U.S. 857 (1976); *Bernard v. U.S. Lines, Inc.*, 475 F.2d 1134, 1136 (4th Cir. 1973). It would appear, therefore, that Keene's contention that the Court should treat this action as being "in the nature of a third party action" should be summarily rejected. Our only hesitancy in so proceeding comes from the unpublished decision in *Raybestos-Manhattan, Inc. v. United States, supra*, in which Judge Blumenfeld of the United States District Court of Connecticut did something like what Keene proposes the Court do here.

Raybestos arose from highly unusual circumstances. Approximately one hundred suits had been filed against Raybestos-Manhattan, Inc. ("Raybestos"), a manufacturer of asbestos insulation products, by employees of the Electric Boat Division of the General Dynamics Corporation ("Electric Boat") for damages resulting from their exposure to asbestos. Suits against other manufacturers of asbestos products had been filed in the District of Connecticut as well. Raybestos, however, was the only manufacturer defendant that was a citizen of Connecticut. As a result, the Electric Boat employees who were citizens of Connecticut were required to sue Raybestos in Connecticut state court because there was no diversity jurisdiction.

Raybestos impleaded the United States in all of the cases filed against Raybestos in federal court. Because it could not implead the United States in the state court actions, *see* 28 U.S.C. § 1346(b), Raybestos filed an independent action in the district court for indemnity and contribution for the state court actions. The Government moved to dismiss for lack of subject matter jurisdiction. Judge Blumenfeld denied the motion, holding that the complaint should be treated as a third party complaint to the extent that it would bring the action within the "third party" exception of 28 U.S.C. § 2675(a).

The principal reason underlying Judge Blumenfeld's decision was to gain judicial economy in an unusual set of circumstances. The same considerations do not apply to the case at bar. All the cases filed in the District of Connecticut by employees of Electric Boat had been consolidated for purposes of discovery because of the complexity of the litigation. This action, in

contrast, involves twenty-eight separate federal districts and includes cases that are not related to shipbuilding activities. *See generally In Re Asbestos & Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977). (Ironically, none of the cases brought against Keene have been filed in this district.) Moreover, unlike Raybestos, which had impleaded the United States in those cases that had been filed in federal court, Keene has generally not impleaded the United States in the federal actions brought against Keene. To the extent that cases brought against Keene have been terminated, this action would not effectuate any of the joinder policies of Rule 14 discussed by Judge Blumenfeld in *Raybestos*. In short, whereas Judge Blumenfeld avoided the duplication of litigation that would have resulted merely because some of the plaintiffs lacked diversity, this action does not avoid such duplication. Accordingly, the Court shall not treat this action as a third party action for the purposes of the section 2675(a) exception.

Keene argues in the alternative that it has satisfied the administrative filing requirements of section 2675. Prior to the commencement of this action, Keene presented an Amended Notice of Claim[5] ("Amended Notice") listing the docket numbers of approximately 1000 lawsuits instituted against Keene for damages allegedly resulting from the exposure to asbestos fibers. This notice was presented to various agencies including the General Services Administration, the Department of Justice, the Judge Advocate General of the Army, the Department of Health, Education & Welfare, the Surgeon General, the Department of Defense, the Department of Labor, and the United States Public Health Service. By the time Keene filed this action, 1500 more lawsuits had been filed against it. A total of 6000 lawsuits had been filed by the time this Court heard oral argument on this motion.[6] Most of the lawsuits for which Keene seeks

[5] An undated "Notice of Claims" was submitted to the agencies on or about September 25, 1978. This initial notice was superceded by an "Amended Notice of Claim" ("Amended Notice"), which was filed prior to final administrative disposition of the initial notice.

[6] As of November 1, 1980, 5,959 cases had been filed against Keene of which approximately 700 had been terminated by settlement, verdict, non-suit, or dismissal. Approximately forty-five new cases are filed against Keene each week. Affidavit of Howard Mileaf ¶ 5.

indemnification or contribution, therefore, are not encompassed by the Amended Notice. Consequently, Keene's claims resulting from those lawsuits clearly cannot be considered under the FTCA. *See Szyka v. United States Secretary of Defense*, 525 F.2d 62, 65 (2d Cir. 1975); *Altman v. Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972).

With respect to the 1000 lawsuits for which purported administrative claims have been filed, the Government contends that the Amended Notice is defective because it fails to state a sum certain, *see* 28 C.F.R. § 14.2 (1980), and because it does not provide sufficient information to allow an investigation, *see* 28 C.F.R. § 14.4 (1980),[7] as required by the regulations promulgated pursuant to 28 U.S.C. § 2872.[8] There is a conflict among the circuit courts, however, over whether the administrative filing requirements of 28 U.S.C. § 2675 should be read in light of these regulations. The Fifth Circuit has ruled that these regulations do not apply to section 2675 because they bear

[7] The Government also contends that the Amended Notice is defective because it was not accompanied by evidence of the purported representative's authority to present a claim on behalf of Keene as required by 28 C.F.R. § 14.3(e). This request, however, appears to have been satisfied by a letter from Keene's chief executive, Glenn W. Bailey, to the Department of Justice that specifically authorizes Keene's lawyers to present claims on Keene's behalf.

[8] 28 U.S.C. § 2672 provides, in pertinent part, that

> [t]he head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

solely on the procedures to be followed for the settlement of claims and not on the manner in which a claimant must present his or her claim. *See Adams v. United States, supra*, 615 F.2d at 288-293. In contrast, other circuits have applied the Justice Department regulations to determine whether a claimant has satisifed section 2675. *See, e.g., House v. Mine Safety Appliances Co., supra*, 573 F.2d 615-16; *Lunsford v. United States*, 570 F.2d 221, 225 (8th Cir. 1977); *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 19-20 (3d Cir. 1975). Although there does not appear to be any Second Circuit decision directly on point, district judges in this circuit have applied these regulations to section 2675. *See, e.g., Luria v. C.A.B.*, 473 F. Supp. 242, 244 (S.D.N.Y. 1979) (Lasker, J.); *Kantor v. Kahn*, 463 F. Supp. 1160 (S.D.N.Y. 1979) (Sand, J.).

Despite this conflict over the relationship between sections 2672 and 2675, it is well established that a claimant must place a specific dollar amount on his damages. *Adams v. United States, supra*, 615 F.2d at 291 n.15.[9] It is clear that Keene has failed to satisfy this requirement. The Amended Notice does not seek a definite sum of money. Rather, Keene seeks $1,088,135 *plus* "an additional amount yet to be ascertained."[10] Claims for indeterminate damages simply do not satisfy the sum certain requirement. *See, e.g., Caton v. United States*, 495 F.2d 635 (9th Cir. 1974); *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971); *Raymond v. United States*, 445 F. Supp. 740 (E.D. Mich. 1978); *Wright v. United States*, 427 F. Supp. 726, 727 n.2 (D. Del. 1977).

Keene responds that the Court may disregard the reservation as to future claims. *See Fallon v. United States*, 405 F. Supp.

[9] In *Adams*, the Fifth Circuit construed section 2675 as requiring the notice of claim to include a specific amount of claimed damages. Other circuits have reached the same result through the "sum certain" requirement of 28 C.F.R. § 14.2 (1980). *See, e.g., Caton v. United States*, 495 F.2d 635, 637 (9th Cir. 1974).

[10] Amended Notice of Claim at 13. Similarly, in its Amended Complaint, Keene seeks "an amount presently unknown but which is believed to be in excess of $20 million." Amended Complaint at 36.

1320, 1322 (D. Mont. 1976). *But see Mudlo v. United States*, 423 F. Supp. 1373 (W.D. Pa. 1976). Even if the Court were to do so, however, the Amended Notice would still be deficient because it fails to particularize the damages requested for each individual lawsuit insofar as Keene seeks "costs, expenses, insurance premiums, attorneys' fees [and] the cost of executive time."[11]

There is another reason why the Amended Notice is insufficient. After Keene submitted the Amended Notice, the Justice Department, on its behalf and on behalf of the other agencies to which the Amended Notice had been sent, requested a more detailed statement from Keene pursuant to 28 C.F.R. § 14.4 (1980). Specifically, the Justice Department requested a list of the amount of damages sought on each claim together with an itemization of various additional items of recovery sought by Keene in relation to each particular lawsuit. It also requested information regarding any insurance benefits that Keene might have recovered on these claims. Keene has not provided this information to the Government.

Once again, although there is a dispute over whether the regulations enacted pursuant to section 2672 apply to section 2675, *compare Adams v. United States, supra*, with *Swift v. United States*, 614 F.2d 812 (1st Cir. 1980), the Government, at a minimum, is entitled to sufficient information to enable it to evaluate the claim and choose between settlement and litigation. *Adams v. United States, supra*, 615 F.2d at 289. Claimants who fail to respond to an agency's request for this information

[11] In this regard, the Court agrees with the Government's analogy to administrative tort claims made on behalf of a class of claimants. Although Keene has technically put forth only one claim, that claim is the aggregate of the one thousand separate claims that Keene could have filed for each individual lawsuit filed against Keene. In this respect, it is like a class action.

When an aggregate claim is made on behalf of a class of claimants, the notice must state a specific amount for each claim. *See, e.g., House v. Mine Safety Appliances Co., supra*, 573 F.2d at 615; *Luria v. C.A.B., supra*, 473 F. Supp. at 245; *Kantor v. Kahn, supra*, 463 F. Supp. at 1164. Similarly, Keene must state the specific amount it seeks for each individual asbestosis lawsuit. Keene has failed to do this.

are treated as having not exhausted their administrative remedies and, consequently, cannot present their claims to a district court. *See Swift v. United States*, *supra*, 614 F.2d at 814; *Emch v. United States*, 474 F. Supp. 99, 103 (E.D. Wis. 1979), *aff'd*, 630 F.2d 523 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1482 (1981); *Founding Church of Scientology v. FBI*, 459 F. Supp. 748 (D.D.C. 1978). Keene's response that the Government is generally familiar with asbestosis litigation is insufficient. Although the Government may be on notice of the various theories on which Keene seeks contribution and indemnification, the Government is nevertheless entitled to specific information regarding each claim. *See Founding Church of Scientology*, *supra*, 459 F. supp. at 758. The Government clearly cannot be expected to settle the claims on an all or nothing basis. Moreover, the Government is not required to sift through the records of the individual lawsuits filed against Keene; the burden is on the claimant to supply the necessary information. *See Kantor v. Kahn*, *supra*, 463 F. Supp. at 1163.

Because Keene has failed to comply with the administrative filing requirements of section 2675, the Court cannot exercise subject matter jurisdiction over the claims asserted under the FTCA. We next consider Keene's claim of admiralty jurisdiction.[12]

Admiralty Jurisdiction

The Suits in Admiralty Act ("SIAA"), 46 U.S.C. § 741 *et seq.*, and the Public Vessels Act ("PVA"), 46 U.S.C. § 781 *et seq.*, constitute a waiver by the United States of its sovereign immunity against suits arising out of maritime incidents. *Blanco v. United States*, 464 F. Supp. 927, 930 (S.D.N.Y. 1979). Under the SIAA, the United States has waived sovereign immunity with respect to "cases where if such vessel were privately owned or operated,

[12] These two theories of jurisdiction are mutually inconsistent. The FTCA specifically provides that it does not apply to suits in admiralty against the United States. 28 U.S.C. § 2680(d); *see Kelly v. United States*, 531 F.2d 1144 (2d Cir. 1976).

or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. § 742. By the PVA, sovereign immunity was further lifted with respect to "damages caused by a public vessel of the United States." 46 U.S.C. § 781. This aspect of the motion to dismiss, therefore, turns on whether Keene's claims against the United States come within this admiralty jurisdiction.

a. Tort Jurisdiction

We note at the outset that although the persons making claims against Keene were often exposed to asbestos in maritime settings, Keene's claims over against the United States result from actions and inactions taken in Washington, D.C. *See* note 3 *supra*. It is a very long stretch to convert these governmental decisions into admiralty torts. We shall proceed, however, on the assumption that the ultimate damage to Keene bears a remote relationship to admiralty.

The standard test for federal admiralty tort jurisdiction is (1) did the wrong occur on navigable waters, and (2) does the wrong complained of bear a significant relationship to traditional maritime activity. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 254-61 (1972). The first part of the *Executive Jet* test, the situs requirement, however, must be read in light of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 ("EAJA"), which extends jurisdiction to injuries that occur on land, so long as the injury was caused by a vessel or one of its appurtenances. *See generally Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209-12 (1971). The EAJA does not affect the requirement that the wrong bear a significant relationship to traditional maritime activity. *See Heim v. City of New York*, 442 F. Supp. 35, 37 (E.D.N.Y. 1977).

A difficult aspect of this case is determining where the alleged wrong occured. Keene alleges in Paragraph 13 of the Amended Complaint that "[m]ost of the claimants were involved in installing high temperature thermal insulation around pipes and boilers *on naval ships, on vessels in navigable waters, and in*

power plants and other industrial and commercial plants, including refineries." (Emphasis added.) This allegation of various situs of injuries typifies the difficulty of bringing a consolidated action of this sort. The Court may not determine whether maritime jurisdiction exists as to the entire group of 6000 lawsuits, but must make its determination on a more individualized basis. *Brown v. United States*, No. 76-434, slip op. at 21 (D. Conn. July 23, 1979). Because the burden of establishing jurisdiction is on the party who asserts it, *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980); *Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87 (2d 1975), the Court could require Keene to make a more specific showing of jurisdiction. Rather than protract these proceedings any further,[13] however, the Court has reviewed Keene's claim of admiralty jurisdiction *generally* and has determined that admiralty tort jurisdiction does not lie.

At the outset, the Court can eliminate all claims for lawsuits involving workers who were exposed to asbestos while working "in power plants and other industrial and commercial plants, including refineries." Amended Complaint ¶ 13. Although the EAJA extends admiralty jurisdiction to shoreside workers, the injury must still be "caused by a vessel on navigable water." 46 U.S.C. § 740; *see Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (5th Cir. 1980). The EAJA does not convert " 'a classic non-maritime, land-based injury into something else.' " *Pryor v. American President Lines*, 520 F.2d 974, 979 (4th Cir. 1975) (quoting *Kent v. Shell Oil Co.*, 286 F.2d 746, 750 (5th Cir. 1961)), *cert. denied*, 423 U.S. 1055 (1976). Rather, there must be a proximate cause relationship between the injury and the vessel. *Bailey v. Johns-Mansville Corp.*, No. 77-1, slip op. at 5 (E.D. Va. March 30, 1978). That the asbestos was ultimately installed on a vessel does not establish the requisite proximate cause. *Id.*

With respect to those claims for lawsuits of plaintiffs who were exposed to asbestos while working on vessels in navigable

[13] The Government initially noticed this motion in May of 1980. The Court did not receive the final papers on this motion until June, 1981.

waters, the Court must determine whether the installation of high thermal insulation around pipes and boilers bears a significant relationship to traditional maritime activity. The Court concludes that it does not.

The factors that are frequently considered in determining whether the tort alleged bears a significant relationship to traditional maritime activity include the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and the traditional concepts of the role of admiralty law. *See Edynak v. Atlantic Shipping Inc.*, 562 F.2d 215, 220-21 (3d Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *Otto v. Alper*, 489 F. Supp. 953, 955 (D. Del. 1980); *Montgomery v. Harrold*, 473 F. Supp. 61 (E.D. Mich. 1979); *Kayfetz v. Walker*, 404 F. Supp. 75, 76-77 (D. Conn. 1975) (Lumbard, Cir. J.).

The function and role of the Government *viz* Keene was that of supplier of asbestos and purchaser of asbestos products. As the purchaser, the Government designed the specifications for the asbestos products. There is nothing in this relationship that is indigenous to maritime law. *See generally Bailey v. Johns-Manville*, *supra*, slip op. at 5.

The "vehicles involved" include naval ships and vessels. That these workers were exposed to asbestos on ships rather than in power plants or refineries was purely fortuitous. Moreover, it does not appear that these ships ever left the dock while they were being built or repaired. *See Montgomery v. Harrold*, *supra*, 473 F. Supp. at 64.

The cause and type of injury, exposure to asbestos, is certainly not unique to admiralty. Indeed, lawsuits stemming from the exposure to asbestos have arisen from a variety of industries. *In Re Asbestos & Asbestos Insulation Material Products Liability Litigation*, *supra*, 431 F. Supp. at 907. Moreover, Keene has not referred to anything in the traditional concepts of admiralty that would militate toward admiralty jurisdiction in this case. There is simply no significant relationship between the hazards of asbestos and traditional maritime activity.

b. Contract Jurisdiction

Keene also contends that admiralty jurisdiction exists with respect to Keene's claims for breach of warranty sounding in contract. The Court rejects this claim of admiralty jurisdiction as well.

The general rule is that admiralty jurisdiction is limited to contracts that are related to a maritime service or a maritime transaction. *See generally* 1 Benedict on Admiralty §§ 182, 183 (1974 & Supp. 1980). "The mere fact that the services to be performed under a contract relate to a ship or its business, or that a ship is the object of such services, does not, in and of itself, mean they are maritime. The test to be applied in deciding whether or not a contract is maritime is its nature and subject matter." *P.D. Marchessini & Co. v. Pacific Marine Corporation*, 227 F. Supp. 17, 18 (1974) (Weinfeld, J.). The contracts between the Government and Keene involved the purchase and sale of asbestos fiber and thermal insulation products. Although some of these products might have ultimately been used in the construction or repair of vessels, that fact alone will not convert a nonmaritime contract into a maritime contract.

FECA Claims

Many asbestosis claimants were employees of the United States working in naval shipyards when they were exposed to asbestos.[14] As such, their exclusive remedy against the United States is pursuant to the Federal Employees Act ("FECA"), 5 U.S.C. § 8101 *et seq*. They are not precluded, however, from instituting suit against negligent third parties.

Keene seeks contribution or indemnity for the damages it has paid or will pay in those actions brought against it by Government employees. It is not clear what Keene's jurisdictional basis is for this claim. FECA does not constitute a waiver of sovereign immunity. Keene must therefore rely on FTCA, SIAA, or PVA

[14] The Amended Notice does not indicate how many claimants are or were employees of the United States Government. The Government needs this information to settle these claims.

jurisdiction, which for reasons already discussed, are not available to Keene.[15] Moreover, FECA bars suits by joint tortfeasors against the United States for contribution or indemnity relating to a federal employee's injuries. *See Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978);[16] *Galimi v. Jetco*, 514 F.2d 949 (2d Cir. 1975). *See also Austin v. Johns-Manville Sales Corporation*, 508 F. Supp. 313, 317 (D. Me. 1981); *Oman v. Johns-Mansville Corp.*, 482 F. Supp. 1060, 1069-71 (E.D. Va. 1980). To the extent that Keene seeks contract based immunity, its remedy is in the Court of Claims under the Tucker Act. *See* 28 U.S.C. §§ 1346(a)(2), 1491. *Galimi v. Jetco, supra*, 514 F.2d at 951.

In Counts 19 through 23 of the Amended Complaint, Keene seeks recovery of the amount of FECA benefits that the Government has recouped from asbestosis claimants. FECA provides that whenever a federal employee obtains a judgment on, or settles a claim arising out of his death or injury, the federal employee must reimburse the Government for its FECA payments. 5 U.S.C. § 8132. The Government's lien on its employees' recoveries from third parties is typical of workers' compensation programs.

Keene contends that it is entitled to the monies recouped by the Government because the Government played a significant role in causing the injuries to the asbestosis claimants. Keene sets forth five separate theories of recovery: Count 19 is a claim for damages based on unjust enrichment. Count 20 is a claim for restitution of money had and received. Count 21 is a claim

[15] Keene also alleges federal question jurisdiction. 28 U.S.C. § 1331. We summarily reject this claim of jurisdiction because it is well established that federal question jurisdiction is not a waiver of sovereign immunity. *See, e.g., Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978); *Doe v. United States Civil Service Commission*, 483 F. Supp. 539 (S.D.N.Y. 1980).

[16] Although *Zapico* involved the "exclusive remedy" provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), that provision is nearly identical to that of FECA and has been construed in a similar fashion.

for consequential damages arising from the Government's intentional conduct. Count 22 alleges an unconstitutional taking of property without due process of law. Count 23 seeks to enjoin the Government from future violations of Keene's constitutional rights. Jurisdiction for Counts 19, 20, and 21 is alleged to exist under the FTCA and the SIAA. Keene alleges jurisdiction for Counts 22 and 23 under 28 U.S.C. § 1331, federal question jurisdiction.

Keene's assertion of FTCA and SIAA jurisdiction for Counts 19-21 must be rejected for the reasons discussed earlier. With respect to the claim under the FTCA, Keene has failed to satisfy the administrative filing requirements of 28 U.S.C. § 2675. Accordingly, the Court cannot exercise subject matter jurisdiction over Keene's claims under the FTCA. SIAA jurisdiction cannot be relied upon since there is no nexus between the Government's recoupment of its FECA liens and traditional maritime activities. Accordingly, the Court does not have subject matter jurisdiction over Counts 19-21.

Keene's assertion of federal question jurisdiction for its constitutional claims must likewise be rejected. Keene relies primarily on the landmark case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court first implied a private cause of action for damages arising out of a violation of constitutional rights by government officials. *Bivens*, however, does not stand for the proposition that the United States may be sued for constitutional violations. *Norton v. United States*, 581 F.2d 390, 393 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). It authorizes actions only against the responsible federal official. *Butz v. Economou*, 438 U.S. 478. 504 (1978). *Bivens* type actions brought against the United States, therefore, are routinely dismissed for lack of subject matter jurisdiction. *See, e.g., Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 104 (2d Cir. 1981); *Leonhard v. United States*, 633 F.2d 599, 618 n.27 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3864 (U.S. May 18, 1981) (No. 80-1651). To the extent that the Court would have jurisdiction to hear Keene's constitutional claims, jurisdiction would lie under the Tucker Act, 28 U.S.C. 1346(a). Since Keene's claims

exceed $10,000, jurisdiction lies exclusively in the Court of Claims. *See Estate of Watson v. Blumenthal*, 586 F.2d 925, 928 (2d Cir. 1978); 1 Moore's Federal Practice ¶ 0.65[2.-3] (2d ed. 1980).

Conclusion

It is clear that something must be done to decongest the courts from the glut of asbestos related lawsuits.[17] Although the Court understands Keene's efforts to make the unmanageable more manageable, this action must be dismissed because Keene has attempted to do too much at one time, with too little jurisdiction. The doctrine of sovereign immunity, although commonly considered to be "dying," remains powerful and permits the United States to dictate the manner in which it may or may not be sued. *United States v. Mitchell*, 100 S. Ct. 1349, 1352 (1980). Because Keene has failed to satisfy the requirements for bringing suit against the United States, this action must be dismissed for want of subject matter jurisdiction.[18] Accordingly, the Government's motion to dismiss is granted.

SO ORDERED.

Dated: New York, N.Y.
September 30, 1981

/s/ Gerard L. Goettel
GERARD L. GOETTEL
U.S.D.J.

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[17] It may be that the only practicable solution is a legislative one. *Cf.* Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*

[18] In addition, to the extent that Keene seeks indemnity for actions that have not been terminated, the Court lacks subject matter jurisdiction because there is no case or controversy. *See generally Forty-Eight Insulations, Inc. v. Johns-Manville Product Corp.*, 472 F. Supp. 385 (N.D. Ill. 1979).